IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-278

LAWRENCE CONNELL, CHAIRMAN OF THE NATIONAL CREDIT UNION ADMINISTRATION BOARD, et al.,
Petitioners

v.

AMERICAN BANKERS ASSOCIATION, et al.,

FEDERAL HOME LOAN BANK BOARD, et al.,
Petitioners

v.

INDEPENDENT BANKERS ASSOCIATION OF AMERICA

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, et al., *Petitioners*

v.

UNITED STATES LEAGUE OF SAVINGS ASSOCIATIONS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents, American Bankers Association and Tioga State Bank, respectfully request that this Court deny the petition for writ of certiorari by which the petitioners seek review of the judgment rendered in

this case by the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The judgment of the court of appeals is unpublished [1] but appears in Appendix A at page 1a. The memorandum and opinion of the district court in this case is reported *American Bankers Association* v. *Connell,* at 447 F. Supp. 296 (D.D.C. 1978), and appears in Appendix B at page 8a.

JURISDICTION

The respondents accept the jurisdictional statement in the petition.

QUESTIONS PRESENTED

A. These respondents abstain from commenting on Questions 1 and 3 as presented by the petitioners, as they are not relevant to the only case in which the respondents were parties below.

B. These respondents submit that Question 2 as presented by the petitioners is not properly before the Court. Whether the National Credit Union Administration may promulgate rules governing the ability of credit union members to withdraw funds from an account by means of *a* draft was not an issue below and was not decided below. What was at issue below was the legality of the form of account from which withdrawals could be made—the functional equivalent of an interest-bearing checking account—and the legality of a specific kind of draft, the Federal credit union share draft.

[1] The fact that the district court's decision was vacated and set aside is reported as a "Decision without Opinion" at 595 F.2d 897 (D.C. Cir. 1979).

C. These respondents present instead the following Question:

> Whether the Federal Credit Union Act can be read to authorize share drafts and share draft accounts in the absence of a specific enumerated power, and in the face of contrary legislative and administrative history.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set forth in Appendix C at page 18a.

STATEMENT OF THE CASE

The Federal credit union share draft program was created as an "experiment" in 1974. Share drafts are paper instruments physically and functionally resembling commercial bank checks in most relevant respects. A Federal credit union member uses share drafts to pay bills or obtain cash in exactly the same fashion as a commercial bank customer uses checks. However, Federal credit union share draft accounts differ from checking accounts in one important way. The former earn dividends or interest; the latter do not because commercial banks are prohibited from paying interest on such accounts by federal law. 12 U.S.C. §§ 371a, 1828(g) and 1832 (1976).

The National Credit Union Administration agreed to conduct rulemaking proceedings on the share draft program only after a lawsuit was filed challenging the legality of the program.[2] That suit was dismissed with-

[2] *American Bankers Association* v. *Montgomery,* No. 76-1661 (D.D.C., filed Sept. 7, 1976) (dismissed without prejudice, Feb. 1, 1977).

out prejudice on motion of the plaintiffs when NCUA agreed to a moratorium on the approval of new "experimental" programs while rulemaking was conducted. A proposed rule was published February 28, 1977; hearings were held and written comment received on it. The final regulation was published December 8, 1977, and the present litigation was instituted the following day.

Despite the lengthy administrative and judicial proceedings in this case, the Federal credit union share draft program has continued to grow. Participating Federal credit unions now hold some $783 million in share draft accounts,[3] largely at the expense of commercial banks which have not been able to overcome the very considerable problem of trying to compete with an interest-bearing transaction account when the law prevents them from paying interest on comparable accounts. That kind of "competition" has been unfair to commercial banks and, as the court of appeals has found, illegal.

REASONS FOR DENYING THE PETITION

Probably the best reason for denying this petition for a writ of certiorari is that the petitioner has advanced no good grounds for granting it. On the facts and the law, this case is of insufficient importance to warrant the attention of this Court.

[3] Petition for Certiorari, p. 11.

1. In All Likelihood, Even A Decision By The Supreme Court On The Merits Of This Case Would Not Be Dispositive Of The Question Of The Legality Of Federal Credit Union Share Drafts In View Of Pending Legislation.

In the judgment rendered below, the court of appeals stayed the effect of its order until January 1, 1980, in order that the Congress of the United States might give or deny to Federal credit unions the authority to offer share draft accounts or comparable accounts. It is in that forum that the issue should be settled. The court wrote its judgment

> with the firm expectation that the Congress will speedily review the overall situation and make such policy judgment as in its wisdom it deems necessary by authorizing in whole or in part the methods of fund transfer involved in this case or any other methods it sees fit to legitimize, or conversely, by declining to alter the language of existing statutes, thus sustaining the meaning and policy expressed in those statutes as now construed by this court. Appendix A, p. 5a.

The court of appeals entered its judgment on April 20, 1979. Almost immediately, Congress began to take up the issue: various bills were introduced and hearings were held. On September 11,[4] the House of Representatives passed a bill designed to legitimize, effective December 31, 1979, the services of all three forms of financial institutions which were disallowed by the court of appeals. Additionally, on September 30, 1980, all depository institutions will be authorized to offer

[4] 125 Cong. Rec. H7605-06 (daily ed. Sept. 10, 1979) and 125 Cong. Rec. H7650-51 (daily ed. Sept. 11, 1979).

NOW accounts.[5] As this brief is being prepared, the Senate Banking Committee is engaged in an executive session considering comparable legislation. In short, Congress shows every inclination to vote up or down the public policy issues involved in the share draft question before the January 1, 1980 deadline set by the U.S. Court of Appeals for the District of Columbia Circuit.

As a result of these legislative developments, the petitioners gain nothing by attempting to premise the "importance" of this case upon the amount of money involved. It is apparent that the fate of existing share draft programs will be determined one way or the other by Congress, and that is as it should be. If Congress does authorize share drafts or something comparable for Federal credit unions, then the decision of the court of appeals will have no factual effect whatsoever; if Congress refuses to authorize share drafts, then certainly the court of appeals is correct in saying that such a failure would "sustain . . . the meaning and policy expressed in [the] statutes as now construed by [the] court." Appendix A, p. 5a.

When Congress is asked to overrule by legislation some earlier interpretation of a statute and declines to do so, that fact is taken into account in the court's later interpretation of the statute. ***T.I.M.E., Inc.*** v. ***United States,*** 359 U.S. 464, 478 (1959). Congress now has the issues actively under advisement, and the respondents at least are reticent to predict the outcome of the legislature's deliberations. It is, we respectfully

[5] NOW accounts are interest-bearing transaction accounts now limited by law to depository institutions in New England and New York. The statutory definition of "depository institution" does not include credit unions.

suggest, premature for the Court to consider the issues now, prior to imminent Congressional action on the subject.

2. The Petition Raises No Novel Or Important Questions Of Law, Nor Would A Decision On The Merits Of This Case By The Supreme Court Resolve Any Pending Disputes In The Lower Courts Or Any Conflicts Between The Circuits.

As indicated above, this case may be factually important, but to the extent that it is, it will be resolved by Congress. However, the case presents no important question of federal law which should be decided by this Court. The ultimate question, whether share drafts are lawful under the Federal Credit Union Act, as it is now written, is a one-time issue. *See* Petition, p. 12. It has not arisen before this case, and will not arise again.

But even though this case may technically be one of first impression, it was decided by the court of appeals by the judicious—and correct—application of settled and undisputed principles of law. Mr. Justice Stevens has written that "the Court seldom takes a case merely to reaffirm settled law." ***Estelle*** v. ***Gamble,*** 429 U.S. 97, 115 (1976) (Stevens, J., dissenting). The court of appeals recognized this as well. That court has specifically directed that the decision not be published. That is done only when the issues do not warrant full opinions. *See* Rule 13(c) of the General Rules of the U.S. Court of Appeals for the District of Columbia Circuit.

The petitioners maintain that the court of appeals failed to accord due deference to the regulatory agency interpretation of its own governing statute. Petition, p. 12. Nothing in the decision of the court of appeals is inconsistent with the doctrine of "due deference."

In fact there are numerous well-established exceptions to it. For example, the court will not grant deference to an agency interpretation of a statute where there are compelling indications that the interpretation is wrong. *Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86 (1973). One of the "compelling indications" is a prior inconsistent agency position on the same subject, rendered more nearly contemporaneously with the enactment of the statute. *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976). Such a prior inconsistent opinion appears in the records of this case. A predecessor to Mr. Connell held in 1971 that Federal credit unions were limited to accepting traditional savings-type accounts. [1973] *Credit Union Guide (P-H)*, ¶ 15,126.3. Notwithstanding this earlier interpretation of the law, the NCUA determined that "untraditional" checking-type share draft accounts were legal, and the agency, therefore, authorized such accounts in the regulation here in issue. *See* 42 Fed. Reg. 11247-48 (1977).

Another "compelling indication" is contrary legislative history. *General Electric Co.* v. *Gilbert, supra.* The court of appeals here found that the "history of laws regulating financial institutions . . . demonstrates an intent on the part of Congress not to authorize federal credit union share draft programs." Appendix A, p. 4a, n. 2.

That determination was more than amply supported by the record. The original 1934 Federal Credit Union Act was specifically designed to promote thrift among credit union members and to provide a source of credit for provident and productive purposes,[6] whereas the share draft rule creates a volatile form of account in-

[6] 78 Cong. Rec. 7259 (1934) (remarks of Sen. Sheppard).

herently inimical to the concept of thrift and one which does not contribute to the "source of credit" available to credit union members as administered. At substantially the same time that the Federal Credit Union Act was enacted, Congress also enacted legislation prohibiting the payment of interest on demand deposits. That law was applicable only to commercial banks, demonstrating quite clearly that Federal credit unions had no comparable power. If Federal credit unions had had such power, then the prohibition would have applied to those institutions as well. The same law eliminated the demand deposit powers of Postal Savings Banks so that those "consumer oriented" institutions would not have an unfair competitive advantage over the commercial banks no longer able to pay interest on demand deposits.[7]

A 1959 amendment to the Federal Credit Union Act authorized the sale of checks and money orders by credit unions to their members. This amendment was adopted only after Congress was assured that such a limited power would not put Federal credit unions in competition with commercial banks.[8]

In 1965[9] and 1969,[10] legislation was introduced in Congress which would have authorized demand deposit accounts for Federal credit unions. These bills would hardly have been introduced if the credit unions already had the powers the bills would have granted to them. Neither bill passed.

[7] 77 Cong. Rec. 4168-69 (1933) (remarks of Sen. Connally).

[8] Hearings on S. 1786, S. 1985 and H.R. 8305 Before the Senate Committee on Banking & Currency, 86th Cong., 1st Sess. 57 (1959).

[9] H.R. 8199, 89th Cong., 1st Sess. (1965).

[10] H.R. 29, 91st Cong., 1st Sess. (1969).

In 1973, Congress enacted P.L. 93-100, the NOW account legislation which permitted customers to use negotiable instruments to make withdrawals from interest bearing accounts at certain financial institutions in Massachusetts and New Hampshire. Subsequent legislation extended NOW accounts to five additional states. 12 U.S.C. § 1832 (1976). Credit unions were specifically and deliberately excluded from participation in the NOW account program.[11]

Between 1975 and April 20, 1979, at least five bills were introduced in Congress, any one of which would have bestowed upon credit unions some form of transaction account powers. In every instance, Congress failed or refused to pass the legislation. Even now, Congress is not considering the share draft program in a vacuum. If Congress authorizes share drafts at all, it will only be in conjunction with some comparable or offsetting authority to be granted to other forms of financial institutions at the same time so that unfair competition will not result—something that NCUA could not and cannot do.

The petitioners argue that "nothing in the Federal Credit Union Act or any other statute prohibits federally chartered credit unions from using checks or check-like instruments to facilitate customer withdrawals or payments to third parties." Petition, p. 16. In concluding that the absence of a specific statutory prohibition was not controlling, the court of appeals carefully adhered to well- and long-settled principles enunciated by this Court. In *Thomas* v. *West Jersey*

[11] *See* 119 Cong. Rec. 28074 (1973) (remarks of Rep. Patman); Hearings Before the Senate Banking Committee, 93rd Cong., 1st Sess. 3 (1973) (statement of Sen. McIntyre).

Railroad Co., 101 U.S. 71, 82 (1880), the Court held that

> the powers of corporations organized under legislative statutes are such and such *only* as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others. (Emphasis supplied.)

Finally, the petitioners claim that there is "sufficient statutory basis for the NCUA's share draft regulation." (Petition, p. 16, citing the "contract power" of federal credit unions,[12] the implied powers clause of the Federal Credit Union Act,[13] and the rulemaking powers of the NCUA.[14])

Obviously, reliance on the "contract power" begs the question. Credit unions, like any other entity, have only the power to enter into those contracts having a legitimate end. Whether the end, the creation of a share draft account, is or is not legitimate has been the whole issue in this case.[15]

With respect to the implied powers of credit unions and the rulemaking powers of the agency, the court of

[12] 12 U.S.C. § 1757(1) (1976).

[13] 12 U.S.C. § 1757(15) (1976).

[14] 12 U.S.C. § 1766(a) (1976).

[15] Even the district court, which otherwise ruled in favor of the petitioners' position, rejected the argument that the "contract power" provided authority for the share draft program. *American Bankers Association* v. *Connell, supra* at 299, Appendix B, p. 12a, n. 4.

appeals found that the statutory provisions granting those powers were insufficient to justify share draft accounts. In doing so, the court again followed unchallenged law and precedent. This Court has held that there are limits to rulemaking power of an agency:

> The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is . . . [only] the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. *Manhattan General Equipment Co.* v. *Commissioner,* 297 U.S. 129, 134 (1936).

There are comparable limitations upon the exercise of "implied powers" of statutory creations, long recognized by the courts:

> [A] national bank's activity is authorized as an incidental power, "necessary to carry on the business of banking," within the meaning of 12 U.S.C. § 24, Seventh, if it is convenient or useful *in connection with the performance of one of the bank's established activities pursuant to its express powers* under the National Bank Act. *If this connection between an incidental activity and an express power does not exist, the activity is not authorized as an incidental power. Arnold Tours, Inc.* v. *Camp,* 472 F.2d 427, 432 (1st Cir. 1972). (Emphasis supplied.)

The court of appeals, therefore, did nothing other than determine that the share draft rule is "out of harmony" with Congressional intent, and that the share draft program bears no relation to any enumerated power of Federal credit unions. There is ample support

in the record for such conclusions, as indicated above at pages 8-10.

3. The Petition For Certiorari Should Be Denied For The Additional Reason That Its Form Violates Rule 23 Of The Supreme Court Rules, To The Prejudice Of These Respondents.

The fact that the petitioners have chosen to file a single petition for certiorari designed to cover three cases instead of separate petitions for each of the three has imposed an unconscionable burden upon the respondents. Because the share draft case is joined in this fashion with the remote service unit and automatic transfer cases, these respondents are put to the choice of attempting to argue the lack of importance of questions in which we have no interest, or of ignoring those questions. The latter alternative risks the possibility that the Court may grant certiorari in all three cases in order to reach a question raised in one of the other cases, even though no question of sufficient independent importance appears in the share draft case.

The Supreme Court rules do not authorize such a procedure. A single petition for certiorari covering multiple cases may be filed only when the cases "involve identical or closely related questions." [16] But the petitioners themselves do not believe that the questions involved here are "identical or closely related." The petitioner Federal Home Loan Bank Board petitioned the court of appeals for a rehearing in its case arguing that it is *un*related to the share draft and automatic transfer cases.[17] Before this Court, the petitioners argue

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[16] Sup. Ct. R. 23(5).

[17] Petition for Rehearing and Suggestion that Rehearing Be En Banc, *Independent Bankers Association of America* v. *Federal Home Loan Bank Board* (D.C. Cir. No. 78-1849), p. 8.

for a decision based upon the "*separate* statutory provisions and legislative history involved in each case." [18]

In view of the petitioners' consistent position that the cases are separate and distinct, they should not now be heard to claim the contrary, that the cases are "identical or closely related." *Callanan Road Improvement Co.* v. *United States,* 345 U.S. 507, 513 (1953).

[18] Petition, p. 8. (Emphasis supplied.) *See also* Brief of Credit Union National Association and National Association of Federal Credit Unions, *Amici Curiae,* p. 11, which speaks of "the very different legal issues underlying the three cases, which each turn on the construction of quite different statutory provisions." Additionally, the Brief of San Diego Federal Savings & Loan Association as *Amicus Curiae,* p. 12, maintains that the three cases "involved totally different agencies, issues and statutory schemes," and that the questions presented in the share draft case and the automatic transfer case "have no meaningful legal relationship to the question presented in the Bank Board appeal."

CONCLUSION

The court of appeals held that issues of high financial public policy, such as the share draft issue, ought to be decided by the United States Congress, the body created by the Constitution for that purpose. The petitioners now claim that the court of appeals was wrong. For the reasons stated above, the respondents disagree with that claim, and respectfully urge the Supreme Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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September 21, 1979

APPENDIX.

APPENDIX A

NOT TO BE PUBLISHED—SEE LOCAL RULE 8(f)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed Apr. 20, 1979]

SEPTEMBER TERM, 1978

Civil Action No. 77-2102

No. 78-1337

AMERICAN BANKERS ASSOCIATION AND
TIOGA STATE BANK, APPELLANTS

v.

LAWRENCE B. CONNELL, JR., Administrator of the
National Credit Union Administration, ET AL.

Civil Action No. 76-0105

No. 78-1849

INDEPENDENT BANKERS ASSOCIATION OF AMERICA,
a corporation, APPELLANT

v.

FEDERAL HOME LOAN BANK BOARD, ET AL.

Civil Action No. 78-0878

No. 78-2206

UNITED STATES LEAGUE OF SAVINGS ASSOCIATIONS, an Illinois not-for-profit corporation, APPELLANT

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, an agency of the United States, ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: McGOWAN, TAMM and WILKEY, Circuit Judges

JUDGMENT

These causes came on to be heard on their records on appeal from the United States District Court for the District of Columbia, and they were argued by counsel before this panel.

It appears to the court that the development of fund transfers as now utilized by each type of financial institution involved herein, commercial banks with "Automatic Fund Transfers," savings and loan associations with "Remote Service Units," and federal credit unions with "Share Drafts," in each instance represents the use of a device or technique

which was not and is not authorized by the relevant statutes, although permitted by regulations of the respective institutions' regulatory agencies. Specifically, the transfer from an interest-bearing time deposit (savings) account to a noninterest-bearing demand (checking) account by the Automatic Fund Transfer system, authorized by the Board of Governors of the Federal Reserve System in 43 Fed. Reg. 20,001 (1978) (to be codified in 12 C.F.R. § 217.5(c)(2) and (3)), is that "indirect[] . . . device" prohibited by 12 U.S.C. § 371a (1976);[1] the Remote Service Units utilized by many savings and loan associations, pursuant to Federal Home Loan Bank Board regulations (12 C.F.R. § 545.4-2 (1978)) which permit the withdrawal of funds from an interest-bearing time deposit account by a device functionally equivalent to a check, are in violation of the prohibition against checking accounts contained in Section 5(b)(1) of the Home Owners' Loan Act of

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[1] Similarly, the Automatic Fund Transfer system authorized by the Federal Deposit Insurance Corporation in 43 Fed. Reg. 20,222 (1978) (to be codified in 12 C.F.R. § 329.5 (c)(2)) is in violation of 12 U.S.C. § 1828(g) (1976), which directs the Board of Directors of the FDIC to prohibit the payment of interest on demand deposits. The court is of the view that the Automatic Fund Transfer system allows, in effect, for interest to be paid on demand deposits.

The Automatic Fund Transfer system also, in its effect, violates 12 U.S.C. § 1832(a) (as amended by Pub. L. No. 95-630, § 1301, 92 Stat. 3712, 10 Nov. 1978), which provides that, except in seven New England states, withdrawals from savings accounts may not be made by negotiable or transferable instruments for the purpose of making transfers to third parties.

1933 (12 U.S.C. § 1464(b)(1) (1976)); and the Share Drafts utilized by some federal credit unions, pursuant to National Credit Union Administration regulation (12 C.F.R. § 701.34 (1978)), are the practical equivalent of checks drawn on these interest-bearing time deposits in violation of the provisions of the Federal Credit Union Act, 12 U.S.C. §§ 1751-90 (1976).[2]

The history of the development of these modern transfer techniques reveals each type of financial institution securing the permission of its appropriate regulatory agency to install these devices in order to gain a competitive advantage, or at least competitive equality, with financial institutions of a different type in its services offered the public. The net result has been that three separate and distinct types of financial institutions created by Congressional enactment to serve different public needs have now become, or are rapidly becoming, three separate but homogeneous types of financial institutions offering virtually identical services to the public, all without the benefit of Congressional consideration and statutory enactment.

This court is convinced that the methods of transfer authorized by the agency regulations have outpaced the methods and technology of fund transfer

[2] The Act does not contain an express grant of power to offer share drafts, nor can that power be implied in view of the legislative history of laws regulating financial institutions (*see* Brief for Appellant in No. 78-1337, at 9-26), which demonstrates an intent on the part of Congress not to authorize federal credit union share draft programs.

authorized by the existing statutes. We are neither empowered to rewrite the language of statutes which may be antiquated in dealing with the most recent technological advances, nor are we empowered to make a policy judgment as to whether the utilization of these new methods of fund transfer is in the overall public interest. Therefore, we have no option but to set aside the regulations authorizing such fund transfers as being in violation of statute. We do so with the firm expectation that the Congress will speedily review the overall situation and make such policy judgment as in its wisdom it deems necessary by authorizing in whole or in part the methods of fund transfer involved in this case or any other methods it sees fit to legitimize, or conversely, by declining to alter the language of existing statutes, thus sustaining the meaning and policy expressed in those statutes as now construed by this court.

We recognize that enormous investments have been made by various financial institutions in the installation of new technology, that methods of financial operation in the nation have rapidly grown to rely on much of this, and that a disruption of the offered services would necessarily have a deleterious impact on the financial community as a whole, in the absence of the certainty that new procedures are authorized for the foreseeable future, which certainty only a Congressional enactment can give.

We recognize that there are arguments that Congress has, at some times and in some measure, tacitly approved part of these regulatory authorizations, but

by no means directly, explicitly, or in the whole. We further recognize that the wisdom of the transfer procedures permitted by the regulations of the several agencies is a matter of high public financial policy, involving the financial interests not only of the parties before this court in these proceedings, but also of other large groups in the nation. It is the responsibility of the Congress and not the courts to determine such policy.

On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this court that the judgments of the district courts under review herein are reversed and the cases are remanded to the respective district courts with instructions to vacate and set aside the applicable portions of the following regulations:

(1) 43 Fed. Reg. 20,001 (1978) (to be codified in 12 C.F.R. § 217.5(c)(2) and (3)) of the Board of Governors of the Federal Reserve System;

(2) 43 Fed. Reg. 20,222 (1978) (to be codified in 12 C.F.R. § 329.5(c)(2)) of the Board of Directors of the Federal Deposit Insurance Corporation;

(3) 12 C.F.R. § 545.4-2 (1978) of the Federal Home Loan Bank Board; and

(4) 12 C.F.R. § 701.34 (1978) of the National Credit Union Administration; and it is

FURTHER ORDERED, by the Court, that the effectiveness of this Judgment, insofar as it directs that the subject regulations be vacated and set aside,

is stayed until 1 January 1980 in the expectation that the Congress will declare its will upon these matters; and it is

FURTHER ORDERED, by the Court, that the Clerk is directed to enter copies of this Judgment in each of the captioned cases.

Per Curiam

For the Court:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed Mar. 7, 1978]

Civil Action 77-2102

AMERICAN BANKERS ASSOCIATION, ET AL.,
PLAINTIFFS

v.

LAWRENCE B. CONNELL, JR., ET AL., DEFENDANTS

MEMORANDUM

This is an action by the American Bankers Association and Tioga State Bank against the National Credit Union Administration ("NCUA") and its Administrator, challenging the statutory authority of Federal Credit Unions ("FCUs") to operate share draft programs under the Federal Credit Union Act (the "FCU Act"), 12 U.S.C. § 1751, *et seq.*[1] The

[1] On February 17, 1978, this Court denied motions to intervene filed by the Independent Bankers Association of America (seeking intervention as party-plaintiff), Credit Union National Association, National Association of Federal Credit Unions, and the Consumer Federation of America (seeking intervention as parties-defendant). However, the Court granted these organizations leave to participate as amici curiae. The terms "plaintiff" and "defendant" used herein shall include reference to the positions of the amici.

matter is before the Court on the parties' cross-motions for summary judgment. For the reasons discussed below, the Court finds that there are no genuine issues of material fact and that Defendants are entitled to judgment as a matter of law.

A share draft is a demand draft which is drawn by a member on his credit union share account and which is made payable to third parties. Each share draft is payable through a particular commercial bank. The function of the payable-through bank is to receive share drafts through bank clearing channels and present them to the credit union for payment. Share drafts are similar in appearance to checks and other drafts in that they provide spaces for a date, the name of the payee, the amount of the draft, and the member's signature as drawer. The member fills in the share draft, signs it, and delivers it to the payee in return for goods or services or for cash. Because the accounts on which share drafts are drawn are share accounts, such accounts earn dividends in the same fashion as regular credit union shares. However, no dividends are paid on those funds that are withdrawn from the account by share draft or otherwise before the end of the dividend period. Share draft accounts are subject to the right of FCUs to require sixty (60) days advance notice of withdrawal.

FCU share drafts originated in 1974 as an experimental pilot program approved by NCUA. By late 1977 some 514 FCUs in at least forty-five (45) states were participating in share draft programs. In Sep-

tember 1976, the American Bankers Association filed an action challenging the legality of the experimental share draft program. That litigation was dismissed without prejudice after NCUA agreed to undergo rule-making procedures and promulgate a formal rule governing share drafts. On December 8, 1977, NCUA published its final rule, which authorizes FCUs to continue establishing and implementing share draft programs.[2] Plaintiffs filed the instant lawsuit on December 9, 1977.

The issue before the Court is whether, consistent with the terms of the FCU Act and the general statutory scheme controlling federal financial institutions, the NCUA can authorize FCUs to utilize share drafts as a means of accessing members' accounts. A secondary issue in the case is whether the manner in which NCUA promulgated its regulation comports with the standards of the Administrative Procedure Act.

The Court begins with the proposition that a departmental construction of its own enabling legislation is entitled to great deference from the Courts. *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). The interpretation given the statute by the agency charged with its administration is sustainable as long as that interpretation has a reasonable basis in law. Only where there are compelling indications that the interpretation is plainly erroneous should a Court invalidate an administrative construction of a statute. *Espinoza* v. *Farah Manufacturing Company*, 414 U.S. 86, 94-95 (1974); *Zuber* v. *Allen*, 396 U.S. 168, 192-193 (1969); *Board of Dir. & Officers, Forbes Federal Credit Union* v. *National Credit Union Administration*, 477 F.2d 77, 784 (10th Cir. 1973).

[2] See 12 C.F.R. § 701.34 at 42 Fed. Reg. 61977 (1977). The effective date of the rule was February 6, 1978, but implementation of the rule has been deferred pending resolution of the motions for summary judgment.

It is uncontested that FCUs possess the power to authorize and regulate withdrawals from share accounts. The source for this power is no where found in the express provisions of the FCU Act.[3] Rather, such power must be inferred from the language of 12 U.S.C. § 1757(15), which grants FCUs the authority to "exercise such incidental powers as shall be necessary or requisite to enable [FCUs] to carry on effectively the business for which [FCUs are] incorporated." An activity is authorized as an "incidental power" if it is convenient or useful in connection with the performance of one of the institution's established activities pursuant to its express powers. *Arnold Tours* v. *Camp*, 472 F.2d 427, 432 (1st Cir. 1972).

Defendants contend that the authority for FCUs to use share drafts procedures likewise can be inferred from the "incidental powers" clause of the

[3] While 12 U.S.C. § 1757(6) gives FCUs the express authority to receive the funds of their members for deposit into withdrawable share accounts, and makes those shares subject to the terms, rates and conditions established by the board of directors and the Administrator, the Act is completely silent as to how withdrawals may be requested or paid.

FCU Act.[4] Plaintiffs argue that share draft powers fail to qualify as incidental powers under the *Arnold Tours* standard. Plaintiffs liken share drafts to checks and demand deposits and claim that absent express statutory authorization FCUs lack the authority to permit members to access their accounts by means of share drafts.

Both sides focus too strongly on the mechanics of accessing accounts. What is important is not the method by which withdrawals are effected, but rather the type of account involved in this litigation: the traditional FCU share account.[5] There is no legal restriction on the amount or frequency of withdrawals from credit union share accounts. In the past, FCU members have had a variety of options available for withdrawing funds and making payments to third-parties out of their share accounts, including

[4] Defendants also argue that share drafts are expressly authorized under the FCU Act as part of the exercise of FCUs' powers to contract, 12 U.S.C. § 1757(1), or powers to receive and condition payments on shares, 12 U.S.C. § 1757 (6). However, the Court is not persuaded that either express provision, by itself, extends to the accessing of members' share accounts by means of share drafts.

[5] While share drafts differ from checks in certain respects, most notably in the 60 day notice provision which applies to share drafts, the distinction between share drafts and checks or demand deposits seems irrelevant to the Court. Share drafts may actually be equivalent to checks. In whatever manner share drafts are classified, however, the function of share drafts remains constant: share drafts are simply a method of accessing credit union share accounts. The validity or invalidity of share drafts must be measured, therefore, in terms of the relationship between share drafts and share accounts.

cash withdrawals, and withdrawals by travelers checks, by money order, or by credit union check. Further, it is not necessary that members make their withdrawals in person. Share drafts have been developed as a more convenient and efficient means by which FCUs can offer withdrawal and payment services, allowing FCUs to take advantage of advancements in computer technology.[6] Share drafts are simply a variation on established methods of accessing members accounts, similar to previous procedures for credit union third-party payments, and similarly valid as part of the exercise of FCUs incidental powers under the FCU Act.[7] To rule otherwise would be to raise form over substance, to deny the history of the use of drafts in commercial practice, and to unreasonably limit the undisputed power of FCUs to honor and regulate share account withdrawals.

Such a holding does not work violence with the statutory purposes for which FCUs were created. FCUs exist for the purposes of promoting thrift among members and creating a source of credit for provident or productive enterprises. 12 U.S.C. § 1752 (1). There has been no suggestion that the share draft program, as presently conducted on an experimental basis, has adversely affected the viability of

[6] The major advancement in the field has been the development of electronic funds transfer devices.

[7] See in the context of state-chartered credit unions, the Court's discussion in Iowa Credit Union League v. Iowa Department of Banking, Civil No. CE 6-3152 (D. Iowa May 24, 1977), appeal docketed, No. 2-60827, Supreme Court of Iowa, July 8, 1977.

FCUs or the interests of FCU members. The Court is satisfied that the use of share drafts will serve the basic purposes of FCUs.[8]

Further, the Court is persuaded that a finding that share draft practices are among the incidental powers of FCUs is not inconsistent with the legislative history of the FCU Act or the general Congressional scheme controlling federal financial institutions. Legislative history in this case has minimal utility. On the one hand, there is no indication from the Congressional debates on the FCU Act and other related legislation that Congress has intended to prohibit FCUs from utilizing share draft procedures. Throughout the course of development by FCUs of various methods of withdrawal from members' share accounts, there has been total silence from Congress concerning the propriety of any of these methods. Congress has been well aware of the on-going share draft program for several years now,[9] and yet in passing sweeping amendments to the FCU Act in 1977 failed to include any provision evidencing disagreement with the NCUA's position regarding share drafts. When Congress has intended to proscribe conduct on the part of financial institutions, Con-

[8] See the conclusions of the Administrator of NCUA, expressed at 42 Fed. Reg. 69178 (December 8, 1977).

[9] Between 1974 and 1976, share drafts were called to the attention of the Congress during testimony before the House and Senate oversight committees on federal financial institutions on numerous occasions. See the subcommittee hearings cited in Defendants' brief in support of Defendants' motion for summary judgment, pp. 24-25.

gress has done so with dispatch and specificity. See 12 U.S.C. §§ 1464(b) and 1832.[10] Thus it might be possible to find an implied ratification by Congress of NCUA's approval of FCU share drafts. See *Massachusetts Mutual Life Ins. Co.* v. *United States*, 288 U.S. 269, 283 (1933); *Alabama Association of Insurance Agents* v. *Board of Governors of the Federal Reserve System*, 533 F.2d 224 (5th Cir. 1976).

On the other hand, measures which would have authorized certain third-party payment powers on the part of FCUs have been introduced in the Congress, but have failed to pass.[11] In addition, there is language in the Congressional discussions on the FCU Act and related legislation that Congress has intentionally deferred consideration of the issue of FCU third-party payment powers.[12] This deferred consid-

[10] With respect to the NOW account legislation, 12 U.S.C. § 1832, it is interesting to note that FCUs were expressly excluded from the definition of "depository institutions" covered by the statute.

[11] See H.R. 8199 (1965) and 29 (1969), which would have given FCUs the authority to offer checking accounts for their members. See also H.R. 13077 (1976), which would have authorized FCUs to offer third-party payment accounts in states where state-chartered credit unions had that power. In addition, a provision in the proposed Credit Union Modernization Act of 1977 (123 Cong. Rec., p. H-166) would have amended 12 U.S.C. § 1757 to give FCUs the power to "sell, purchase or handle any money transfer instrument to or for members," but did not pass.

[12] See the remarks of Rep. J. William Stanton, Cong. Record, March 1, 1977, p. H-1525. See also the remarks of Senator Thomas McIntyre in the context of the NOW account legis-

eration is evident in the fact that there is presently pending before the Congress several pieces of proposed legislation which relate to FCU share draft powers.[13]

Congressional failure to specifically address the share draft issue and the spectre of future legislation on the subject do not mean that FCUs presently lack the authority to adopt share draft procedures. As noted earlier, share draft practices are valid as part of the exercise of the incidental powers of FCUs. If Congress eventually acts with regard to share drafts, Congress then will be making a policy judgment.[14] This Court cannot and will not indulge in such policy judgments. If accessing FCU members' accounts by means of share drafts is to be proscribed, it must be proscribed by the legislature.

The NCUA promulgated its final rule concerning share drafts, 12 C.F.R. § 701.34, after extensive rulemaking which included the solicitation of written and

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lation, Hearings, Senate Banking Committee, Subcommittee on Financial Institutions, 93d Cong., 1st Sess., March 30, 1973, p.3.

[13] See, for e.g., S. 2055, introduced on June 9, 1977, which would authorize the use of NOW Accounts by banks, savings and loans, and credit unions, and bring FCU share draft regulations into accord with regulations to be promulgated as to NOW Accounts.

[14] Both sides make much about the competitive position of FCUs vis-a-vis commercial banks. However, there is at present no policy concern with respect to competitive balance reflected in the FCU Act. This is what distinguishes the case at hand from Independent Bankers Association of America v. Smith 534 F.2d 921 (D.C. Cir. 1976).

oral views of numerous persons, organizations and banks, and which involved hearings in which plaintiffs and the various amici participated. The Court is not persuaded that the manner in which the rule was formulated is in any way violative of the provisions of the Administrative Procedure Act. In creating the NCUA, Congress directed the agency to be more responsive to the needs of credit unions and to provide more flexible and innovative regulation.[15] NCUA's actions with respect to share drafts are consistent with its mandate. The Court finds that NCUA's determination that share draft practices are in accord with the statutory purposes of FCUs and within the authority of FCUs under the provisions of the FCU Act has a rational basis and is not arbitrary or capricious or otherwise plainly erroneous.

For the above-stated reasons, the Court concludes that defendants are entitled to summary judgment herein.

/s/ Aubrey E. Robinson, Jr.
AUBREY E. ROBINSON, JR.
United States District Judge

March 7, 1978
(Date)

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[15] See S. Rep. No. 518, 91st Cong., 2d Sess., 3 (1970).

APPENDIX C

Statutes and Regulations

STATUTES:

1. 12 U.S.C. 371a provides in pertinent part:

   No member bank shall, directly or indirectly, by any device whatsoever, pay any interest on any deposit which is payable on demand * * *.

2. 12 U.S.C. 1828(g) provides in pertinent part:

   The Board of Directors [of the Federal Deposit Insurance Corporation] shall by regulation prohibit the payment of interest or dividends on demand deposits in insured nonmember banks and for such purpose it may define the term "demand deposit"; but such exceptions from this prohibition shall be made as are now or may hereafter be prescribed with respect to deposits payable on demand in member banks by section 19 of the Federal Reserve Act, as amended, or by regulation of the Board of Governors of the Federal Reserve System. The Board of Directors may from time to time, after consulting with the Board of Governors of the Federal Reserve System and the Federal Home Loan Bank Board, prescribe rules governing the payment and advertisement of interest or dividends on deposits, including limitations on the rates of interest or dividends that may be paid by insured nonmember banks (including insured mutual savings banks) on time and savings deposits. The Board of Directors may prescribe different rate limitations for different classes of deposits, for deposits of different amounts or with different maturities or subject to different conditions regarding with-

drawal or repayment, according to the nature or location of insured nonmember banks or their depositors, or according to such other reasonable bases as the Board of Directors may deem desirable in the public interest. The Board of Directors is authorized for the purposes of this subsection to define the terms "time deposits" and "savings deposits," to determine what shall be deemed a payment of interest, and to prescribe such regulations as it may deem necessary to effectuate the purpose of this subsection and to prevent evasions thereof. * * *

3. 12 U.S.C. 1832 provides in pertinent part:

   (a) Withdrawal by negotiable or transferable instruments; exceptions

   No depository institution shall allow the owner of a deposit or account on which interest or dividends are paid to make withdrawals by negotiable or transferable instruments for the purpose of making transfers to third parties, except that such withdrawals may be made in the States of Massachusetts, Connecticut, Rhode Island, Maine, Vermont, and New Hampshire.[2]

   (b) Definition

   For purposes of this section, the term "depository institution" means—

   (1) any insured bank as defined in section 1813 of this title;

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[2] The state of New York was added to the list of states excluded from the proscription of paragraph (a) of this Section by 92 Stat. 3641, 3712.

(2) any State bank as defined in section 1813 of this title;

(3) any mutual savings bank as defined in section 1813 of this title;

(4) any savings bank as defined in section 1813 of this title;

(5) any insured institution as defined in section 1724 of this title; and

(6) any building and loan association or savings and loan association organized and operated according to the laws of the State in which it is chartered or organized; and, for purposes of this paragraph, the term "State" means any State of the United States, the District of Columbia, any territory of the United States, Puerto Rico, Guam, American Samoa, or the Virgin Islands.

(c) Fine

Any depository institution which violates this section shall be fined $1,000 for each violation.

4. 12 U.S.C. 1757 provides in pertinent part:

A Federal credit union shall have succession in its corporate name during its existence and shall have power—

(1) to make contracts;

* * * * *

(15) to exercise such incidental powers as shall be be necessary or requisite to enable it to carry on effectively the business for which it is incorporated.

5. 12 U.S.C. 1766 provides in pertinent part:

(a) The Board may prescribe rules and regulations for the administration of this chapter (including, but not by way of limitation, the merger, consolidation, and dissolution of corporations organized under this chapter).

REGULATIONS:

1. 12 C.F.R. 701.34 (*see* 42 Fed. Reg. 61977, Dec. 8 1977) provides:

(a) For purposes of this section:

(1) "Share draft" means a negotiable or non-negotiable draft used to withdraw shares from a share draft account.

(2) "Payable through bank" means a bank that has been designated to make presentment of a share draft to the Federal credit union for payment.

(3) "Truncation" means the original share draft is not returned to the member.

(4) "Share draft account" means any regular share account from which the Federal credit union has agreed that shares may be withdrawn by means of a share draft or other order.

(5) "Liquidity reserve" means an allocation of current assets recorded on the credit union's records as cash or deposits and investments as authorized by Section 107 of the Federal Credit Union Act: *Provided,* That, any investments included as a portion of this reserve shall be redeemable within 60 days and have a maturity not in excess of 90 days.

(b) A Federal credit union may provide its members with share drafts. The board of directors shall determine, prior to requesting approval to implement the share draft program, that the members' use of share drafts is economically and operationally feasible for the Federal credit union.

(c) A Federal credit union must submit a written request to operate a share draft program to the Administration at least 60 days prior to the proposed date of implementation. The request shall include:

(1) An official copy of the minutes of the board of directors authorizing a request for approval to implement the share draft program.

(2) All background documentation which supports the board of directors' decision that the members' use of share drafts is economically and operationally feasible for the Federal credit union.

(3) A statement that the forms and procedures to be used have been reviewed by legal counsel.

(4) A statement that the board of directors has determined appropriate surety bond coverage is in force.

(5) A statement of operational specifications which expressly provide for:

(i) Identification of the payable through bank;

(ii) Truncation;

(iii) Establishing a share draft account agreement with each member which outlines the credit union's and member's responsibilities;

(iv) Recording of share overdrafts and giving members notification of such overdrafts should they occur;

(v) Encoding each share draft with the routing and transit number of the payable through bank, the share draft account number, and the serial number of the share draft in accordance with standards required for use in a clearing system utilizing Magnetic Ink Character Recognition devices;

(vi) Preprinting the name of the payable through bank and the name of the credit union on the share draft;

(vii) A method for each member using share drafts to maintain a record of share drafts drawn;

(viii) Submission of a periodic statement of account, no less frequently than quarterly, to each member who has a share draft account which shall include for each share draft processed the serial number, date of payment and the amount of payment;

(ix) Establishing responsibility for detection of unauthorized or forged drafts;

(x) Procedures for processing stop payment orders;

(xi) Procedures for providing members with copies of paid drafts should copies be requested;

(xii) Procedures for retaining paid drafts or copies of paid drafts on file for a period of five years or as required by state law, whichever is greater;

(xiii) The fees, if any, to be charged, provided such fees shall not exceed the direct and indirect costs of providing the service; and

(xiv) Procedures for establishing and maintaining an average daily liquidity reserve equal to 125 per cent of the aggregate amount paid on share drafts during the preceding month divided by the number of days on which share drafts were paid during that month.

(d) A Federal credit union may not commence operating a share draft program until it has received written approval from the Administration, which may limit member participation for a period not to exceed one year. Approval will not be given if:

(1) The requirements of paragraph (c) of this section have not been met;

(2) The supervisory committee has not fulfilled its statutory requirements as specified in the Federal Credit Union Act; or

(3) The management of the credit union has demonstrated through prior performance its inability to handle the additional activity the share draft program will generate.

(e)(1) The Federal credit union shall notify the Administration in writing, at least 60 days in advance of its proposed implementation date, of any modification relating to:

(i) The payable through bank;

(ii) Truncation procedures;

(iii) The share draft agreement;

(iv) Procedures for establishing and maintaining a liquidity reserve; and

(v) Any material modification not previously reviewed and approved by the Administration.

(2) Implementation of a modification is contingent upon written approval of the Administration.

(3) The Federal credit union shall immediately notify the Administration as to any matter affecting the information provided pursuant to paragraphs (c)(1) through (c)(4) of this section.

(f) If a share draft program or a request for modification is not approved, or the share draft program is approved for limited member participation, the Administration will provide to the requester a written notice setting forth the basis for such action.

(g) A Federal credit union shall not waive the right to require notice as set forth in the bylaws, but may guarantee payment of a share draft provided that:

(1) A specific guarantee authorization is obtained for the share draft from the Federal credit union; and

(2) The guarantee authorization is immediately noted on the share draft account to prevent the withdrawal of shares needed to pay the guaranteed share draft.

CERTIFICATE OF SERVICE

I hereby certify that I have this 21st day of September, 1979, mailed three copies of the accompanying Respondents' Brief in Opposition, by first class mail, postage prepaid, to each of the following:

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